NO. 44333-3-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

DEPARTMENT OF LABOR AND INDUSTRIES,

Appellant/Cross-Respondent,

v.

BART A. ROWLEY, SR.,

Respondent/Cross-Appellant

REPLY BRIEF OF CROSS APPELLANT

MASTERS LAW GROUP, P.L.L.C.
Kenneth W. Masters, WSBA 22278
241 Madison Ave. North
Bainbridge Island, WA 98110
(206) 780-5033
Attorney for Respondent/Cross-Appellant

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INTRODUCTION

The Department fails to respond directly to the cross appeal, instead scattering responses throughout its Reply. Rowley stated his cross appeal in a direct fashion. Neither he nor this Court should be required to search out responses. Such tactics just make more work for the Court and counsel. They just increase the fees the Department should be ordered to pay when Rowley prevails here.

Rowley raised three cross-appeal arguments:

> (1) the Legislature narrowed the felony payment-bar in RCW 51.32.020 from "crimes" in general to felonies in particular, suggesting that a true felony must be proved in a proper proceeding;
>
> (2) the Superior Court's exclusive original jurisdiction over felony prosecutions requires that a worker be duly convicted in that court, where the felony payment-bar solely applies to workers who *commit* a felony or an attempted felony; and
>
> (3) at the very least, due process requires the Board to apply the beyond-a-reasonable-doubt standard in felony payment-bar proceedings.

The Department's scattered responses are addressed below. They lack merit.

This Court should hold that the felony payment-bar requires a felony conviction. Alternatively, due process requires proof beyond a reasonable doubt that the worker committed a felony or attempted felony. The Court should also award Rowley fees on appeal.

REPLY ON CROSS APPEAL

A. The Legislature narrowed "crime" to "felony," evincing an intent to narrow the felony payment-bar statute and require proof that a worker committed a felony or an attempted felony.

Rowley first noted the Department's concession that the Legislature had narrowed RCW 51.32.020 from proof of a "crime" to proof of a "felony." BR 15-16. This change strongly supports a narrow interpretation of the statute as requiring proof of a felony under Washington's criminal statutes. *Id.* Felony is simply too specific a term to be treated as cavalierly as the Department wishes.

The Department's entire response to this argument is in its rather confusing footnote 6, on page 34 of its Reply:

> In Section A, Rowley appears to simply restate the positions the Department set forth in its opening brief. Resp't's Br. 15-16. Because the question before the Board was whether Rowley was in the commission of the felony possession of methamphetamine under RCW 69.50.4013, it makes no difference to this Court's analysis whether "the narrow statutory definition of felony" applies or not. Likewise, Rowley's discussion distinguishing "crimes" from "felonies" is not pertinent. Resp't's Br. 16-17.

If that first sentence is a concession of what Rowley said at BR 15-16, Rowley accepts. But the legislative narrowing makes a great deal of difference: if the Legislature had not intended to require proof of an actual felony or felony attempt, it would not have used those words. The Department has no substantive response to this point.

B. The felony payment-bar requires a felony conviction under our Superior Courts' exclusive original jurisdiction, where the statutory definition of "felony" requires proof beyond a reasonable doubt.

Concomitant to his first point that the statutory language requires legitimate proof of a felony or attempted felony, Rowley noted that Superior Courts have exclusive original jurisdiction over felony criminal matters, that the Legislature lacks the power to extend that jurisdiction to the Department or to the Board, and that together these constitutional limitations require a legitimate felony conviction in order to evoke the felony payment-bar. BR 16-18. Again, the Department scatters its responses among its replies.

The Department's first tactic is to misconstrue Rowley's cross appeal as a response to its opening brief. Reply at 3-4 (mischaracterizing the cross appeal as an argument about who bears the burden of proof). This merits no reply.

The Department then "distinguishes" ***In re Winship***, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970), as though Rowley had cited it as apposite authority. Reply 4. The point of ***Winship*** is obviously its holding that the presumption of innocence generally requires the State to bear the burden of proof in all criminal proceedings. BR 17. These and other criminal due-process

protections are intrinsic to any determination that one has committed a felony, or felony attempt, as RCW 51.32.020 unequivocally requires. BR 17-18. This Court should therefore hold that because the statute plainly requires a showing that the claimant committed a felony or felony attempt, a felony conviction obtained in compliance with all of the constitutional protections normally afforded to the accused is a necessary prerequisite to invoking the felony payment-bar. BR 17-18.

The Department again misconstrues Rowley's cross appeal as a response to its arguments, saying that the beyond-a-reasonable-doubt standard does not apply here because, *ipso facto*, this is a civil case. Reply 9-10. Again, Rowley's point is that RCW 51.32.020 expressly requires a showing that he *committed* or *attempted to commit* a felony. BR 16-18. The only way to prove that he did so is to prove the elements of RCW 69.50.4013, in compliance with RCW 9A.04.100. *Id.* The Department's argument that RCW 9A.04.100 is limited to persons charged with a crime just begs the question: must the claimant be convicted of committing a felony or of felony attempt before the Department can prove that he committed a felony or felony attempt? The answer is plainly yes.

The Department finally mentions this argument at Reply 12-13, but then fails to address it. It states that it cannot understand why Rowley cross appealed, claiming (without explanation) that he is not "aggrieved." Reply 13 n.1. But Rowley sought application of the beyond-a-reasonable-doubt standard before the Board and in the Superior Court, and his requested relief was denied. He is obviously aggrieved by those denials.

The Department again misconstrues Rowley's argument by suggesting that Rowley is seeking constitutional protections applicable in a criminal proceeding *in this proceeding*. Reply 25. Rowley's point is rather that the Legislature requires a showing that Rowley committed or attempted to commit a felony, and the only way to prove that a felony was committed or attempted is in a criminal proceeding, under proper constitutional safeguards. BR 16-18. The Department again fails to address the point.

Demonstrating a remarkable instinct for the capillaries, the Department addresses a subsidiary point that Rowley actually did raise: the Department is flouting Rowley's right against self-incrimination (and all of his other constitutional rights) by arguing that he has the burden to prove that he did not commit a felony. Reply 26 (citing BR 18). The Department's response is cynical at best: of

course Rowley can invoke this right – all he has to do is accept that his silence may be used against him. *Id.* Of course, that directly contradicts the right against self-incrimination, which forbids using his silence against him. The Department's apparent claim is that he can invoke his right by giving it up.

The Department finally addresses Rowley's opening argument (that the only way to prove a felony was attempted or committed is in a criminal proceeding) at Reply 34-37. One apparent claim is that the Legislature had to list every step in the process, such as "a criminal charge or a conviction." *Id.* at 34. It similarly invokes "expressio unius" because the Legislature did not use the word "conviction," and even argues that "attempt to commit" shows that no conviction is necessary. *Id.* at 35 & n.7. These arguments lack merit.

First, the Legislature required a showing that a felony was *committed* or *attempted*. Again, the only way to do that is in a criminal proceeding. The Legislature need not list every phase of a criminal prosecution to achieve its desired result.

Second, "expressio unius" is inapplicable: *expression* of one thing excludes its alternative, but here the Legislature said nothing that would exclude the requirement of a conviction. On the contrary,

it required proof that a felony was *committed* or *attempted.* That is wholly consistent with requiring a conviction.

Finally, an attempted felony is – sometimes[1] – a felony. RCW 9A.28.020. The Legislature required the Department to prove that Rowley attempted or committed a felony. RCW 51.32.020. The only admissible evidence of a felony is a conviction. This Court should require proof of a conviction for felony-payment-bar proceedings.

The Department also argues that "the relevant issue is whether the evidence establishes that the character of his actions or conduct at the time of his injury was criminal in nature . . . ." Reply 36. This assertion finds no support in the statute, which requires a felony. And the Legislature removed the word "crime" from this statute many years ago. The Department misstates the issue.

The Department also says that the issue is, "more specifically, whether the elements of the possession felony were met here." *Id.* That is much closer to the issue. But the real issue raised here is whether the Department must show that Rowley *committed* or

[1] Here, possession of methamphetamine is a Class C felony, but attempted possession would be a gross misdemeanor. RCW 9A.28.020(3)(c). Thus, even if Rowley had been prosecuted and convicted of attempted possession, the Department could not meet the requirement of RCW 51.32.020 to prove felony attempt.

attempted to commit a felony. That is what the statute requires, and the only way to do it is to produce a conviction.

After assembling a rather short parade of horribles that has nothing to do with this case (Reply 36), the Department's final claim is that this Court should not follow our Constitution. Reply 36-37. It correctly points out that "RCW 51.32.020 does not charge the Department with the task of charging and convicting Rowley with criminal possession of methamphetamine": that is a job for prosecutors and Superior Courts. But in requiring a showing that Rowley *committed* or *attempted to commit* a felony, the Legislature required legitimate proof of a felony. That requires a felony conviction. This Court should therefore require such proof.

C. Workers are entitled to full constitutional protections in felony payment-bar proceedings because they are subject to severe consequences.

Rowley's final cross-appeal argument is that at the very least due process requires the Board's application of the beyond-a-reasonable-doubt standard in felony payment-bar proceedings. BR 19. Despite the Department's failure to raise or argue ***Mathews v. Eldridge*** below, it now goes on at great length about it. Reply at 13-24 (discussing ***Mathews v. Eldridge***, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976)). It essentially claims that losing worker's

compensation benefits is not a weighty interest, the risk of erroneous deprivation is not great, and the government's interest is important, although it fails to argue that any added burden is too great. *Id.* These arguments lack merit.

The Department's claim that Rowley's interest in receiving benefits is not weighty because he is not entitled to benefits until he proves that he is entitled to benefits is too clever by half. Reply 15-19. The Board found – in an unchallenged finding – that Rowley sustained an industrial injury during the course of his employment. CP 1183 (F/F 1.3). It concluded that he thereby established his entitlement to benefits. CP 13 (the statute does not permit disallowing a claim, but only disallowing payment, so establishing an injury in the course of employment is sufficient to establish a claim). Rowley proved that he was entitled to his benefits unless the Department proved that he committed or was attempting to commit a felony when he was injured. The Department does not argue that his entitlement to benefits, once accrued, is not a weighty interest.[2]

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[2] The Department also argues that Rowley cites "no authority for the proposition that mere reputational damage means that a different standard of review is constitutionally mandated, [so] this Court should disregard his argument." Reply 18. That was not Rowley's argument, so no authority is needed. Potential reputational damage was simply one of the many reasons that the Board gave for requiring a heightened standard. CP 14.

The Department also argues that because Rowley was not subject to criminal prosecution at the time of this action (due to the statute of limitations) his interest is not weighty. Reply 17. But the point of the Board's rulings is that *workers* may be subject to criminal prosecution, so at least a clear, cogent and convincing standard must apply. The Department's undue focus on Rowley himself at the expense of other workers is too myopic to merit credence.

On the risk of erroneous deprivation, the Department essentially argues that because Rowley had rights to hearings and appeals, the risk of erroneous deprivation is small. Reply 19-21. But due process requires an opportunity to be heard "in a meaningful manner." ***Mathews***, 424 U.S. at 333 (quoting ***Armstrong v. Manzo***, 380 U. S. 545, 552, 85 S. Ct. 1187, 14 L. Ed. 2d 62 (1965)). Allowing workers to be deprived of compensation through the bizarre mechanism the Department proposes (requiring them to prove that they did not commit a felony by a preponderance of the evidence) deprives workers of their property interests without anything remotely resembling due process. Even depriving workers of compensation where the Department "proves" the commission of a felony by a preponderance of circumstantial evidence lacks any of the required

procedural safeguards normally protecting accused persons. The Department's proposed procedures do not satisfy due process.

Finally, the Department claims that its interests in protecting public funds and in discouraging "workers from committing felonies in the workplace" outweigh the benefits of providing an appropriate standard for proving felonies. Reply 21-24. But the Department has never provided any evidence that requiring an appropriate standard of proof will increase the costs of such proceedings. *See, e.g.*, ***Mathews***, 424 U.S. 347 (the issue is the cost of any *additional* safeguards). This is because it never addressed ***Mathews*** below. As such, it has waived its opportunity to provide such evidence.

As for deterring workplace felonies, it is meritless to assert that creating a mechanism for depriving workers and their dependents of payments will provide any additional deterrence beyond the already substantial criminal penalties. Reply 22. For instance, here Rowley would have faced up to five years in prison and $10,000 in fines for possession of methamphetamines. RCWs 69.50.4013, 9A.20.021. The public's interest in further punishing workers and their dependents in these circumstances is very slight.

In sum, due process requires either a felony conviction or (at least) proof beyond a reasonable doubt of a felony or felony attempt.

This Court should reverse the Board's determination that "at least" a clear, cogent and convincing standard applies, and require the appropriate constitutional protections called for by any allegation that a worker committed or attempted to commit a felony.

CONCLUSION

For the reasons stated, this Court should affirm, while holding that either a felony conviction, or at least proof beyond a reasonable doubt that a felony was attempted or committed, is required to invoke the felony payment-bar statute.

RESPECTFULLY SUBMITTED this 5th day of December, 2013.

MASTERS LAW GROUP, P.L.L.C.

Kenneth W. Masters, WSBA 22278
241 Madison Ave. North
Bainbridge Island, WA 98110
(206) 780-5033

CERTIFICATE OF SERVICE BY MAIL

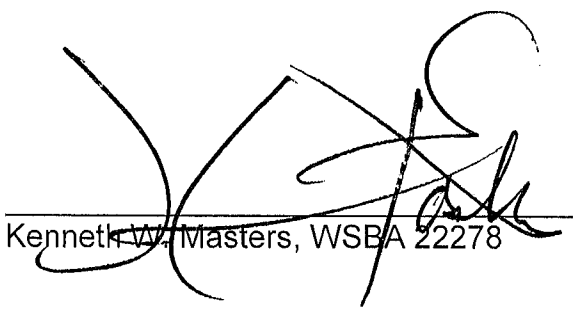
I certify that I caused to be mailed, a copy of the foregoing REPLY BRIEF OF CROSS APPELLANT postage prepaid, via U.S. mail on the 5th day of December, 2013, to the following counsel of record at the following addresses:

Counsel for Appellant/Cross-Respondent

James Mills
Lynette Weatherby-Teague
Office of the Attorney General
P.O. Box 2317
Tacoma, WA 98401

Co-counsel for Respondent/Cross-Appellant

Patrick A. Palace
Palace Law Offices
PO Box 1193
Tacoma, WA 98401-1193



Kenneth W. Masters, WSBA 22278

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